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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 323

HUNT OIL COMPANY, *Petitioner*,

v.

FEDERAL POWER COMMISSION, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a writ of certiorari be issued to review the judgment entered April 17, 1959 by the United States Court of Appeals for the Fifth Circuit (Cause No. 17,256) and the orders of the Federal Power Commission issued February 6, 1958 (in Docket No. G-14229), February 7, 1958 (in Docket No. G-14408) and April 2, 1958 (in Docket Nos. G-14229 and 14408). The judgment affirmed the Federal Power Commission's orders issued February 6, 1958, February 7, 1958 and April 2, 1958.

OPINION BELOW

The order of the Federal Power Commission (in the form of a letter) issued February 6, 1958 (R. pp. 217-219) is not yet reported. The order of the Federal Power Commission issued February 7, 1958 (R. pp. 219-222) is not yet reported. The order of the Federal Power Commission issued April 2, 1958 (R. pp. 244-248) is reported in 19 Federal Power Commission Reports 446 (Preliminary Print). The majority and dissenting opinions of the Court of Appeals are reported in 266 F. 2d at pages 232-233, 222-232[1] and are printed in Appendix A, pp. 1a-2a, 3a-22a.

JURISDICTION

The judgment of the Court of Appeals was entered April 17, 1959 (Appendix A, p. 23a). Rehearing was denied June 3, 1959 (R. p. 296). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act.

QUESTIONS PRESENTED

(1) Does compliance with the certificate and rate filing requirements of Sections 4 and 7 of the Natural Gas Act with respect to a specific sale of natural gas pursuant to a contract of limited duration automatically constitute an unlimited commitment of the gas reserves specifically not dedicated in the contract of sale?

(2) Does the granting of an application for a certificate of public convenience and necessity pursuant to

[1] The Court's majority and dissenting opinions in *Sun Oil Company* v. *Federal Power Commission*, a companion case, in which the Court's reasons for affirming the Federal Power Commission's orders in this proceeding are set forth.

Section 7 of the Natural Gas Act authorizing a sale described in the application which requests authority *only* to continue a sale pursuant to a contract of fixed and limited duration constitute a certificate of unlimited duration?

(3) Does a new gas sales contract relating to a new sale of gas from leases from which there has been a previously completed sale constitute a change in an expired contract filed as a rate schedule and applicable to the previous, completed sale from the same field?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the Fifth Amendment to the Constitution of the United States and Sections 4, 5, 7 and 19 of the Natural Gas Act, as amended, (15 U.S.C. §§ 717c, 717d, 717f, 717r), pertinent provisions of which are printed in Appendix B, pp. 24a-31a.

STATEMENT

Petitioner entered into a contract dated June 30, 1948 with Southern Natural Gas Company ("Southern") for the sale of gas produced from certain unitized leases in the Gwinville Field in Mississippi (R. pp. 40-68). The contract was for a term of ten years from the date of first delivery and under its terms expired June 30, 1958 (R. pp. 63, 198). In connection with the price provisions of the contract, the contract specifically provided:

> "In this connection, it is understood that by this agreement Seller is not dedicating to Buyer, or to Buyer's market outlet, any portion of Seller's gas reserves in the Gwinville Gas Field or any portion of the gas produced by Seller from its wells in said field, but that Seller is simply selling

and Buyer is purchasing the quantity of gas called for in this agreement on the terms specified in this agreement and for the price set out above; * * *" (R. p. 60).

After this Honorable Court held in *Phillips Petroleum Company* v. *Wisconsin*, 347 U.S. 672 (1954) the Natural Gas Act to be applicable to independent producers, Petitioner, on October 5, 1954, with jurisdictional reservations, filed the contract dated June 30, 1948, as then amended, as its rate schedule, pursuant to the requirements of Section 4(c) of the National Gas Act (R. pp. 30, 33, 40-68). On October 12, 1954, Petitioner filed an application for a certificate of public convenience and necessity with respect to the sale covered by the contract of June 30, 1948.[2] The application recited that on and since June 7, 1954 Petitioner had sold natural gas to Southern pursuant to the contract of June 30, 1948, incorporated the contract in the application by reference, and set forth that "* * * application is hereby made only for a Certificate of Public Convenience and Necessity authorizing Applicant [Petitioner herein] to sell natural gas in the circumstances above described * * *" (R. pp. 83, 85, 92, 122). The Respondent accepted the contract dated June 30, 1948 as Petitioner's F.P.C. Gas Rate Schedule No. 6 (R. pp. 147-151, 149). By an order issued February 7, 1956 (F.P.C. Docket No. G-4366), Respondent issued Petitioner a certificate of public convenience and necessity authorizing the sale of natural gas as described in the order and "* * * as more fully described in the application and exhibits in this proceeding" (R. pp. 154-161, 158).

[2] This application related to a number of sales of natural gas including the sale to Southern pursuant to the contract of June 30, 1948.

On December 23, 1957 Petitioner entered into a new contract with Southern for the sale of natural gas from the Gwinville Field, Mississippi (R. pp. 162-202). This contract was a term of twenty years from December 1, 1957 (R. p. 190).[3] On January 10, 1958 Petitioner filed an application for a certificate of public convenience and necessity pursuant to the contract dated December 23, 1957, and, in the alternative, requested the contract of December 23, 1957 be filed as a notice of change in Petitioner's F.P.C. Gas Rate Schedule No. 6, consisting of the contract of June 30, 1948 (R. pp. 203-215). In such application, Petitioner attached the contract dated December 23, 1957 and requested a certificate to make the sale pursuant to such contract (R. pp. 208, 210). In alternatively requesting that the new contract of December 23, 1957 be filed as a notice of change in the rate schedule comprising the contract of June 30, 1948, Petitioner did so without prejudice to the request in the application for a certificate and without waiving any rights of Petitioner with respect to that filing (R. p. 208). In its application for rehearing (discussed below), Petitioner alleged Respondent erred in not filing and accepting the contract of December 23, 1957 as an initial (new) rate schedule (R. p. 233).

By a letter order issued February 6, 1958, the first order reviewed by the Court of Appeals, the Commission *rejected* without notice or opportunity for hearing, the certificate application (R. pp. 217-219). Respondent accepted the contract of December

[3] As of the same date, Petitioner and Southern entered into a letter agreement contingent on the enactment of H.R. 8525, 85th Congress, 1st Session (R. pp. 197-202). H.R. 8525 was not enacted, and the contingencies became ineffective.

23, 1957 as a "notice of change" in the rate schedule comprising the contract of June 30, 1948, and by an order issued February 7, 1958 in F.P.C. Docket No. G-14408, the second order reviewed by the Court of Appeals, suspended the effectiveness of the filing until July 10, 1958, and ordered a hearing to determine whether the prices set forth therein were just and reasonable (R. pp. 217-218, 219-222). Petitioner filed a timely application for rehearing and reconsideration of the Commission's orders issued February 6, 1958 and February 7, 1958 (R. pp. 223-243). By an order issued April 2, 1958 Respondent denied the application (R. pp. 244-248; 19 F.P.C. Reports 446 [Preliminary Print]).

On May 27, 1958 Petitioner filed in the United States Court of Appeals for the Fifth Circuit a petiton to review the Respondent's orders issued February 6, 1958, February 7, 1958, and April 2, 1958 (R. pp. 1-24). After a hearing, the Court on April 17, 1959 affirmed the Respondent's orders (266 F. 2d 233 [Ad. Sheets]; R. pp. 249-250). The Court noted in its opinion that "In material respects the facts in this case are not different from those in *Sun Oil Company v. Federal Power Commission, supra.*" Further, the Court stated that "For the reasons assigned in the opinion in the Sun Oil opinion, the orders of the Federal Power Commission are AFFIRMED." (266 F. 2d 233 [Ad. Sheets]; R. p. 250). Judge Brown in his dissent agreed with the "implicit holding" of the majority that Respondent's jurisdiction over the initial contract of June 30, 1948 continued until its expiration. Judge Brown, however, stated: "But Hunt, like the others, was entitled to a new Certificate on the 'new' contract on and after the expiration date origi-

nally fixed in the initial contract. * * *" (226 F. 2d 233 [Ad. Sheets]; R. 250).

In its letter order issued February 6, 1958 the Commission stated that the certificate application with respect to the sale covered by Petitioner's contract dated December 23, 1957 duplicates the acreage covered by the certificate in Docket No. G-4366 (which authorized the sale pursuant to the contract of June 30, 1948) and no further authorization is required. As Respondent's second order of February 7, 1958 even purported to extend the contract of June 30, 1948, filed as a rate schedule, beyond its expiration date, Respondent, in effect, held that Petitioner's applying for a certificate to make the sale pursuant to the contract of June 30, 1948 and Respondent's granting of a certificate for that purpose constituted an unlimited dedication of Petitioner's gas reserves. The order issued February 7, 1958 also purports to eliminate the term of the contract of June 30, 1948, and to hold that the contract dated December 23, 1957 cannot be filed as a new rate schedule even after the expiration of the June 30, 1948 contract.

REASONS FOR GRANTING THE WRIT

I.

The Respondent's Orders Violate Section 7 of the Natural Gas Act

In one of the early decisions construing the effect of the passage of the Natural Gas Act on contracts of natural gas companies, the Circuit Court of Appeals for the Tenth Circuit in *Colorado Interstate Gas Co. v. F.P.C.*, 142 F. 2d 943, 954, held that "* * * The passage of the Act did not automatically overthrow the contracts into which these companies had previ-

ously entered. * * *"[4] This decision was affirmed by this Honorable Court in *Colorado Interstate Gas Co.* v. *F.P.C.* (1945), 324 U.S. 581. Thus, when the Natural Gas Act was held applicable to independent producers by this Court's decision in *Phillips Petroleum Company* v. *Wisconsin* (1954), 347 U.S. 672, Petitioner's contract dated June 30, 1948 was not "automatically overthrown" or extended beyond the term thereof. The Court of Appeals for the Tenth Circuit confirms this interpretation by its statement in *Cities Service Gas Co.* v. *F.P.C.*, 255 F. 2d 860, 864, *cert.* denied 3 L. ed. 2d 73 (Ad. Sheets) that the "* * * [Natural Gas] Act * * * abrogates *none* of the usual contract rights except for the reviewing powers granted the Commission upon hearing."[4] The term (duration) of a gas sales agreement is one of the usual provisions and conditions of the agreement and is a very important one. The Commission's orders purport to abrogate that term.

At the date of this Court's *Phillips* decision, *supra*, Petitioner had undertaken only to make the sale contemplated by the contract of June 30, 1948. The *contract terms* quoted above related only to the sale of quantities of gas for a fixed term and *specifically do not dedicate* acreage or leases. Under the law of contracts, that sale was completed on June 30, 1958, and the parties could, as they did, agree to a new contract. Under the plain language of Section 7(c) of the Natural Gas Act, an applicant for a certificate of public convenience and necessity initially proposing a sale subject to the jurisdiction of Respondent clearly has

[4] Emphasis indicated by italics is supplied unless otherwise indicated.

the right to propose the terms and conditions of that sale including the price and duration. This is made abundantly clear by this Court's recent decision in *Atlantic Refining Co.* v. *Public Serv. Comm.* ... U.S. ... (Nos. 518 and 536, October Term, 1958), 3 L. ed. 2d 1312, 1318 (Ad Sheets) by this Court's statement that "* * * Certainly the filing of the application for a certificate did not constitute a dedication to the interstate market of the gas recoverable under these leases. * * *" When a sale has been undertaken prior to the date the Natural Gas Act was construed as applicable to independent producers, it is also clear that Petitioner need only seek certificate authority to complete that sale.

As set forth in the Statement herein, Petitioner only sought in the initial certificate application authority to continue the sale undertaken by the contract of June 30, 1948. Under Section 7(e) of the Act, Respondent is required to issue a certificate "* * * authorizing the whole or any part of the * * * sale * * * covered by the application * * *" upon the applicant making the requisite statutory showings including ability to do the acts proposed. Except for the authority in that section to attach conditions, there is no provision in Section 7 of the Act which authorizes the Commission to amend or alter the proposal set forth in the certificate application. Respondent's order of February 7, 1956 issuing the certificate does not purport to extend the sale beyond the proposal in the application, namely the sale undertaken by the contract of June 30, 1948, and terminating on June 30, 1958, with the expiration of the contract (R. pp. 154-161, 158). As of the date Petitioner filed its initial certificate application, October 12, 1954, or as of the date of the final hearing

thereon, January 26, 1956.[5] Petitioner did not and could not show ability to continue the sale beyond June 30, 1958, the date the contract of June 30, 1948 expired by its own terms. The contract of December 23, 1957 was not then in existence, and Petitioner had no purchaser for gas produced after June 30, 1958.

Under the foregoing circumstances, Respondent's order issued February 6, 1958 is a holding that the filing of a certificate application to continue a sale pursuant to a contract of fixed and limited duration and in which there is no dedication of leases or gas reserves, and the granting of the application without conditions as to term, constitutes an unlimited commitment to the interstate market of the gas recoverable under the leases. Such holding clearly exceeds Respondent's authority as Respondent only has authority to issue the certificate for the term sought by Petitioner or to condition the grant on Petitioner's accepting a certificate of unlimited duration.

Respondent has attempted to justify its action throughout these proceedings on the premise that Petitioner must obtain Respondent's approval under Section 7(b) of the Act to cease deliveries pursuant to the contract of June 30, 1948. This Court's decision in *Atlantic Refining Co.* v. *Public Serv. Comm., supra.*, 3 L. ed. 2d 1312, 1319, (Ad Sheets) it is respectfully submitted, shows the fallacy of Respondent's contention. This decision pointed out that "* * * Section 7(e) vests in the Commission control over the conditions under which gas may be initially dedicated to interstate use. Moreover, once so *dedicated* there can

[5] Respondent's order issued February 7, 1956 shows the last hearnig date as "January 26, 1955", which obviously is a typographical error (R. 156).

be no withdrawal of *that* supply from continued interstate movement without Commission approval. * * *" The crucial question is what did Petitioner dedicate? As the contract of June 30, 1948 clearly discloses, Petitioner only agreed to sell specific volumes of gas for a fixed period. The contract specifically provided there is no dedication of gas reserves or gas. Petitioner's certificate application and the Commission's order of February 7, 1956 issuing the certificate did not purport in any way to vary *that* agreement. Such application and order merely sought and authorized certificate authority to fulfill the commitment to sell specific quantities of gas. Although Petitioner entered into, and filed, the contract dated December 23, 1957, prior to June 30, 1958, there can be no question that Petitioner fulfilled all of its obligations and commitments under the contract of June 30, 1948 as of June 30, 1958. Ceasing deliveries after that date could not be an abandonment. Respondent's order issued February 6, 1958 purports to extend the certificate authority indefinitely, and, in fact, Respondent's orders erroneously seek to extend the ten-year commitment in the contract of June 30, 1948 for the productive life of the leases involved.

II.

The Respondent's Orders Violate Section 4 of the Natural Gas Act

Petitioner filed the June 30, 1948 contract as its rate schedule pursuant to the requirements of Section 4(c) of the Natural Gas Act. The contract contained all the prices and terms of the sale contemplated thereby. One of the terms and conditions of the sale as set forth therein was that it be continued for ten years from the date of the initial delivery, or to June 30,

1958. As set forth in the preceding section, this Court's *Phillips* decision, *supra*, did not abrogate any terms of this contract. The filing of the contract as a rate schedule did not alter in any way the terms of the contract. This Court stated in *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332, 342, 343 that the rate filing "* * * requirements [of the Natural Gas Act] are no more than are necessary to implement §§ 4(e) and 5(a); the filing requirements are obviously necessary to permit the Commission to exercise its review functions * * *" and, in short, the Act "* * * provides only for *notice* to the Commission of the rates established by natural gas companies and for *review* by the Commission of those rates. * * *" (Emphasis not added). While the foregoing statements related to the rate terms of sales contracts filed as rate schedules, the statements would also appear applicable to other contract provisions, including the term (duration) of the contract. Respondent took no action with respect to the term of the contract as a rate schedule during the effective term thereof. The order of February 7, 1958 only suspended the effectiveness of the new contract of December 23, 1957. Thus, the contract of June 30, 1948 as such, and as a rate schedule, in any event, expired and had no force and effect after June 30, 1958. After a contract becomes effective as a rate schedule, Respondent's only authority to change the provisions thereof is Section 5(a) of the Act. The record is clear that Respondent did not purport to take any action under Section 5(a) with respect to the provisions of the contract. Additionally, as set forth in the preceding section hereof, Respondent did not purport to condition Petitioner's certificate to continuing the deliveries beyond the date the contract expired.

Under Respondent's holding that the contract rate schedule of December 23, 1957 is a change in the contract rate schedule of June 30, 1948, and that the contract even as a change could have no effectiveness until July 10, 1958, after the June 30, 1948 contract had expired, Respondent has decided either that the filing of the June 30, 1948 contract as a rate schedule automatically extends the term of the contract, contrary to this Court's decision in the *Mobile* case, *supra*, or Respondent has purported to extend the term thereof, which it cannot do without according Petitioner a hearing and making the requisite statutory findings, supported by substantial evidence. Respondent did not take this action.

The Court of Appeals in sustaining Respondent's orders appears to have adopted the theory that the filing of the contract as a rate schedule continued its effectiveness, as it held in the *Sun Oil Company* opinion, *supra*, that " * * * upon the *termination* of a contract fixing a rate which was the subject of an initial rate filing with the Commission, a new contract is made between the same parties for the same service as was provided by the terminated contract but at a higher rate, the new rate is a rate change * * *." (266 F. 2d at 225). Neither the contract of June 30, 1948, nor the contract of December 23, 1957 provided for a service. They provided for the sale and delivery of quantities of gas for specified periods (R. pp. 41, 60, 165). The Court of Appeals for the Fifth Circuit pointed out in *Gulf Oil Corporation* v. *F.P.C.*, 255 F. 2d 556, 557 that " * * * producers are in reality selling gas which they own and are not, in the traditional sense, primarily furnishing a service to the public." In his dissent, in the *Sun Oil Company* case, *supra*,

Judge Brown stated: "As these producers are not engaged in transportation, the sole basis for jurisdiction is the *sale* for resale. * * * " (266 F. 2d at 228, emphasis not added). To hold under the circumstances that the December 23, 1957 contract results in a change in the June 30, 1948 contract after its expiration date as a contract or as a rate schedule, is, we respectfully submit, an erroneous interpretation of Section 4 of the Act and one which clearly contravenes this Court's holding as to the effect of filing contracts as rate schedules.

III.

Respondent's Orders Deprive Petitioner of Property Rights Without Due Process of Law

Petitioner's leases in the Gwinville Field constitute valuable property rights. This Court's decision in *Phillips Petroleum Company* v. *Wisconsin*, 347 U.S. 672, at most subjected these leases to Respondent's regulatory authority *only* to the extent Petitioner had undertaken to sell natural gas for resale in interstate commerce therefrom as of the date of that decision. As of that date, Petitioner retained all other rights to make disposition of additional gas from such leases, subject to Respondent's regulatory authority with respect to any future sales for resale in interstate commerce. Under the most adverse interpretation of Petitioner's commitment of its contract dated June 30, 1948, Petitioner was at liberty after June 30, 1958 to propose a new sale and to refuse a certificate which conditioned that sale. Cf. *Atlantic Refining Co.* v. *Public Serv. Comm., supra.* When, however, Petitioner proposed its second sale, Respondent, without notice and opportunity for hearing, in effect,

ordered Petitioner to continue the sale without limitation as to duration to Southern.

In addition to the substantial monetary loss Petitioner will sustain by Respondent's unauthorized action, Petitioner is denied the property right to propose, at least after June 30, 1958, the new sale negotiated by Petitioner, and to refuse to make the sale on terms which the Commission may impose in a certificate proceeding under Section 7 of the Natural Gas Act. Petitioner respectfully submits that this Court decided in *United Gas Pipe Line Company* v. *Mobile Gas Service Corp., supra, and Atlantic Refining Co.* v. *Public Serv. Comm., supra*, that Petitioner has those rights. Additionally, Respondent has in effect held that all of Petitioner's gas from leases in the Gwinville Field has been committed to a sale to Southern without limitation, under the contract of June 30, 1948, contrary to the holdings of this Court in the foregoing decisions, Petitioner's contracts with Southern, and all filings Petitioner has made with Respondent.

IV.

This Appeal Involves Important Legal and Other Considerations

The questions presented are important in the administration of the Natural Gas Act and in providing at stable prices future sources of gas for ultimate public consumption. It has been the practice of producers of natural gas to sell gas pursuant to contracts of fixed duration. The duration of the sale has been an important consideration in fixing other terms of gas sales contracts, including price provisions. This practice has permitted, at least after the fixed period, a new sale in accordance with the economic conditions

prevailing at the date of the new sale. The importance of the stabilizing effect of contractual arrangements in the regulatoary scheme of the Natural Gas Act was noted by this Court in its *Mobile* decision, *supra*: "By preserving the integrity of contracts, it permits the stability of supply arrangements which all agree is essential to the health of the natural gas industry." (350 U.S. at 344).

If the terms of gas sales contracts are finally held ineffective, as Respondent has held in this proceeding, then Petitioner has the right, as this Court held in its *Mobile* decision, *supra*, to make *ex parte* rate filings with respect to new sources of gas under which Petitioner can "at will" file notices of changes in its rate schedules (350 U.S. at. 343). Clearly, the widespread use of *ex parte*, rate filings, in lieu of contracts of fixed duration, would have a material bearing on the stabilizing effect of fixed duration contracts and would raise new issues in determining the economic feasibility of pipeline proposals. According to Respondent's Thirty-fifth Annual Report, there were some 6,897 independent producer sale schedules in effect on June 7, 1954, the date of this Court's decision in *Phillips Petroleum Company v. Wisconsin*, 347 U.S. 672. Rate filings were made by some 2,141 independent producers during Respondent's fiscal year ending June 30, 1955 (Pp. 108-109). Petitioner believes, based on its general knowledge of the practices throughout the natural gas industry, that a very high percentage of these rate filings consists of contracts of fixed duration. Thus, the questions presented by this petition are important in the administration of the Natural Gas Act.

Judge Brown noted in his dissent that it is implicit in the Court of Appeals' opinion that that Court is apprehensive that administrative regulation will be thwarted if the parties can prescribe the term (i.e., quantity) of the contract (266 F. 2d at 231). Judge Brown points out three reasons why the Court should not be apprehensive in this regard. Additionally, it seems appropriate to point out that in certifying pipeline construction in which the adequacy of the gas supply has been an issue, the Commission's basic consideration has been the estimated volumes of gas committed to the project during the terms of the gas purchase agreements. Hence, it is apparent that gas reserves which have not been committed beyond the terms of sales contracts have had little if any, effect to date on the availability of adequate gas reserves to justify the certification of pipeline projects.

CONCLUSIONS

Respondent's orders issued February 6, 1958, February 7, 1958 and April 2, 1958 exceed Respondent's authority under Sections 4 and 7 of the Natural Gas Act, and deprive Petitioner of his Constitutional and property rights without due process of law. The orders will have a far-reaching effect, and in Petitioner's view, an adverse effect, in the administration of the Natural Gas Act and in making available to the ultimate consumer new sources of natural gas without the stabilizing effect of contracts of fixed duration.

Accordingly, pursuant to Section 19(b) of the Natural Gas Act and Paragraph 1(b) of Rule 19 of the Rules of this Court, Petitioner prays that a writ of certiorari be granted.

Respectfully submitted,

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Certificate of Service

I certify that the foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit was served upon Respondent, the Federal Power Commission, by mailing a copy thereof, postage prepaid, to each of the following attorneys for Respondent on the 19th day of August, 1959:

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